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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Is there a separation of powers component to the Eighth Amendment's prohibition of cruel and unusual punishment?

2. Does *Furman* v. *Georgia* apply to the military?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case presents the possibility of expanding *Furman* v. *Georgia*, 408 U. S. 238 (1972) by the creation of a separation of powers component to the Eighth Amendment, or by applying *Furman* and its progeny to the military. *Furman* should not be expanded into either field. Creating a new separation of powers requirement for the death penalty would needlessly complicate an already overcomplicated body of law.

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1. Both parties have consented to the filing of this brief.

Subjecting the military to *Furman* would burden a special society that does not need *Furman*'s protection. The needless expansion of this Court's capital jurisprudence, if accepted, would be contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in the case.

SUMMARY OF FACTS AND CASE

On December 11, 1988, petitioner Dwight J. Loving, a private in the United States Army, started the crime spree that led to his death sentence. That evening, petitioner robbed at gunpoint two different 7-Eleven stores in Killeen, Texas. The two armed robberies netted him approximately $90.00. *United States* v. *Loving*, 41 M. J. 213, 229 (1994).

Disappointed with this take, petitioner switched from 7-Elevens to taxi drivers. At around 8:00 p.m. on December 12, he called a cab to take him from Killeen to Fort Hood. Petitioner directed the driver to a secluded area of Fort Hood, where he robbed the driver, Private Christopher Fay, at gunpoint. After receiving the money, petitioner shot Private Fay twice in the head, killing him. *Ibid*.

After fleeing to the barracks room and counting his money, petitioner called another cab at around 8:15 p.m. He directed the driver, retired Army Sergeant Bobby Sharbino, to a secluded street in Killeen, where petitioner robbed Sharbino at gunpoint. After forcing Sharbino to lie down on the seat, petitioner shot him in the head and killed him. *Ibid*.

Petitioner tried to kill two more people that night. He pulled a gun on a patron of the nightclub where his girlfriend worked. Fortunately, he dropped the gun, accidentally discharging it. *Ibid*.

Later that night, petitioner and his girlfriend took a cab. After the cab dropped off petitioner's girlfriend, petitioner again directed the driver to a secluded spot, where he tried another armed robbery and execution. The driver successfully resisted this time. *Id*., at 229-230. Petitioner was apprehended the next day, and he subsequently confessed. *Id*., at 230.

A court-martial convicted petitioner on numerous counts, including the premeditated murder of Sharbino and the felony murder of Fay. *Id*., at 231-232. After a sentencing hearing, the court-martial unanimously voted to sentence petitioner "to a dishonorable discharge, total forfeitures, and 'to be put to death.' " *Id*., at 232.

Petitioner's conviction and sentence were affirmed by the Army Court of Military Review, *United States* v. *Loving*, 34 M. J. 1065 (ACMR 1992), and the Court of Appeals for the Armed Forces. *United States* v. *Loving*, 41 M. J. 213 (1994).

SUMMARY OF ARGUMENT

This Court's death penalty jurisprudence is based on assuring the evenhanded application of capital punishment. This rationale has its basis in *Furman* v. *Georgia*, 408 U. S. 238 (1972) which was motivated by fears of racially biased and arbitrary application of capital punishment due to the excessive discretion given to the sentencer.

The drive for evenhandedness continues to manifest itself in the two main lines of capital cases. The narrowing cases attempt to ensure evenhandedness by limiting the jury's discretion, thus minimizing arbitrariness in capital sentencing. This Court's mitigating cases attempt to achieve this same effect by presenting the sentencer with an accurate sentencing profile. To the extent that there is tension between these two lines of cases, it is best reconciled by going back to the first principle of evenhandedness.

In addition to providing the rationale for *Furman* and its successors, evenhandedness also limits judicial oversight of capital punishment. Judicial review is a drastic measure that is best used sparingly. This is particularly true with respect to capital punishment, which plays an extremely important role in the criminal justice system. Therefore, this Court's capital punishment jurisprudence should only be expanded when such expansion would further promote the evenhanded application of the death penalty.

Creating a separation of powers component of the Eighth Amendment would not advance this core purpose of *Furman*.

This Court's capital jurisprudence is unconcerned with which of the three branches of government regulates capital punishment. It is only concerned with whether a state's procedure minimizes the arbitrary application of the death penalty. Separation of powers is a complex doctrine. Adding it to death penalty procedure would further burden an already overly complicated body of law.

Because the military is a different society with a different criminal justice system, it should not be subject to *Furman* and its progeny. Military society requires a much higher level of discipline than its civilian counterpart. Discipline is necessary both to maintain an effective fighting force and to assure civilian control of the military. Punishment, as an integral part of the criminal justice system, is crucial to maintaining this level of discipline. Because capital punishment is very important to any criminal justice system that employs it, the military should not be burdened by *Furman*.

Furman is also unnecessary for the military. One of the greatest sources of potential bias and arbitrariness in capital sentencing is the use of local sentencers and prosecutors. The military system, which is controlled by the nationally elected President, is structurally protected against local bias. Because such arbitrariness is much less likely in a court-martial, *Furman* should not be expanded to include the military.

ARGUMENT

I. The purpose of *Furman* and its progeny is to insure the evenhanded application of capital punishment.

Furman v. *Georgia*, 408 U. S. 238 (1972) unleashed a legal firestorm. It questioned the validity of a practice, capital punishment, which was firmly established since the beginnings of the Republic. Cf. *McGautha* v. *California*, 402 U. S. 183, 197-198 (1971) (capital punishment was the mandatory penalty for murder when the Bill of Rights was adopted). *Furman* overturned every state capital sentencing scheme then in existence, vacating numerous death sentences. Its progeny have spawned an extremely complicated body of law. See Part II A, *post*, at 11-12.

This Court does not foster such disruption without a reason. *Furman* and its progeny are focused on an important overriding goal: "to promote the evenhanded, rational, and consistent imposition of death sentences under law." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976).

The present case is best examined from the perspective of *Furman*'s first principle. Petitioner asks this Court to graft a new separation of powers branch onto *Furman*, and then extend this expanded *Furman* to the military. See Brief for Petitioner 19-20. Any decision as complex and potentially disruptive as *Furman* should only be expanded in accordance with its first principles. Therefore, an examination of *Furman*'s purpose is in order.

A. The Problems.

Furman v. *Georgia*, 408 U. S. 238 (1972) was not decided in a vacuum. When *Furman* was decided there were real questions concerning whether the death penalty was being applied in an evenhanded, racially neutral manner. Justice Douglas' opinion in *Furman* noted several sources supporting this contention. See *id.*, at 250-251. The racial concerns behind *Furman* are highlighted by the fact that three of the four original *Furman* petitioners were represented by the NAACP Legal Defense and Education Fund as part of a nationwide campaign to abolish the death penalty. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 278, 113 S. Ct. 892, 905 (1993) (Thomas, J., concurring). "*Furman* v. *Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States, and most particularly in rape cases." *Id.*, at 277, 113 S. Ct., at 904.

This concern shows through in several of the *Furman* opinions. Justice Douglas felt it cruel and unusual to apply capital punishment "selectively to minorities . . . whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U. S., at 245 (concurring opinion). These sentiments are also found in Justice Marshall's opinion, which noted that "[r]acial or other discriminations in [capital sentencing] should not be surprising . . . ." *Id.* at 365 (concurring opinion). Justice Stewart voiced similar misgivings. "[I]f any basis can be discerned for

the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.*, at 310 (concurring opinion).

Race was not the sole motivation behind *Furman*. "We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." *Id.*, at 253 (Douglas, J., concurring); accord, *id.*, at 310 (Stewart, J., concurring) ("racial discrimination has not been proved"). The essential *Furman* opinions[2] all focused on what each saw as the arbitrariness of the death penalty as it was then applied. Justice White's concurrence looked to the infrequency of death sentences. A death penalty that is imposed too infrequently cannot advance the deterrence or retribution that was at the heart of capital punishment. See *id.*, at 311-312. Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.*, at 313. This arbitrariness was a direct product of the unfettered discretion of capital sentencing juries, and violated the Eighth Amendment. See *id.*, at 314.

The problem of arbitrariness similarly informed Justice Stewart's concurrence. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.*, at 309. Thus, "the petitioners are among a *capriciously* selected random handful upon whom the sentence of death has in fact been imposed." *Id.*, at 309-310 (emphasis added). A penalty "so wantonly and freakishly imposed" violated the Eighth Amendment. *Id.*, at 310.

Justice Douglas summed up the indictment of arbitrariness of the existing system of capital punishment:

> "In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we

2. Being the narrowest positions, the opinions of Justices Douglas, Stewart, and White formed the holding of *Furman*. See *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (lead opinion); see also *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (holding can be found by finding the narrowest ground supported by a majority of the court).

> know that the *discretion* of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position." *Id.*, at 255 (emphasis added).

This is the problem that *Furman* and its successors endeavor to solve.

B. The Solutions.

After *Furman* v. *Georgia*, 408 U. S. 238 (1972) this Court created two lines of authority that try to deal with the problems of capital punishment. One line, drawn directly from *Furman*, requires some narrowing of the class of those who are eligible for the death penalty. See, *e.g.*, *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988). The other line of cases, derived from *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), require that the sentencer be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality).

There is a real debate as to whether there is a tension between *Furman* and the progeny of *Woodson*'s third prong. See *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'Connor, J., concurring); *Franklin* v. *Lynaugh*, 487 U. S. 164, 182 (1988) (plurality); *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring); *Graham* v. *Collins*, 122 L. Ed. 2d 260, 277, 113 S. Ct. 892, 904 (1993) (Thomas, J., concurring); *id.*, at 293, 113 S. Ct., at 916-917 (Stevens, J., dissenting); *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 760, 114 S. Ct. 2630, 2635 (1994). Since a majority of this Court has not yet overruled one of these lines, they must be reconciled. The best way to reconcile them is in *Furman*'s roots in evenhandedness.

The narrowing line of cases directly promotes the evenhanded application of capital punishment. This is best summarized in one of the handful of cases where this Court found insufficient guidance of a capital sentencer's discretion. "Since *Furman*, our

cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988). Where the sentencer's discretion is not limited by an appropriately narrowed capital sentencing scheme, the risk that improper factors may influence the decision to impose the death penalty are too high. Thus the fact that a murder was found to be "outrageously or wantonly vile, horrible and inhuman" could not constitutionally justify imposing the death penalty because "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980) (footnote omitted).

By permitting the sentencer "to make a principled distinction between those who deserve the death penalty and those who do not," *Lewis* v. *Jeffers*, 497 U. S. 764, 776 (1990), the narrowing requirement thus enforces evenhanded application of the death penalty by minimizing the chance that the sentencer will impose the death penalty on the basis of improper factors such as race.

The mitigation line is best interpreted in the same context. The notion in *Lockett* and its progeny that the sentencer must be allowed to take into account as mitigating factors defendant's character, record, and the circumstances of the crime is derived from *Woodson*, *supra*, in which this Court struck down a mandatory sentencing scheme. *Woodson* itself was justified in part by a desire to minimize arbitrariness. One justification given by the *Woodson* plurality for striking down mandatory capital punishment was the inevitable widespread nullification by the sentencer of a sweeping, mandatory death penalty for all first-degree murders. See 428 U. S., at 291-296. If the system does not have a formal outlet for appropriate displays of mercy, those who operate the system will find informal ways. This went on for centuries in England, from the faking of reading tests for benefit of clergy, see F. Maitland & F. Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to improper insanity verdicts, which dropped sharply upon the abolition of capital punishment, see J. Wilson, Thinking About Crime 187 (1976). Evenhandedness is better served by keeping the

inevitable mercy decision in the open and permitting the state to structure it. See *Woodson*, *supra*, 428 U. S., at 303.

The *Woodson* plurality also justified its result by creating a new constitutional imperative of individualized sentencing. See *id.*, at 303-305. This right, which is reiterated in *Lockett* and its successors, is best viewed through the lens of evenhandedness.

By creating a right to mitigating evidence in order to promote individualized sentencing, the *Woodson-Lockett* line creates at least the risk that the jury will consider improper mitigating factors, or will be given too much discretion and thus make the decision to impose the death penalty upon improper grounds. See *Walton*, *supra*, 497 U. S., at 666-667 (Scalia, J., concurring). The defenders of the *Woodson-Lockett* line invoke evenhandedness to rebut this charge.

The most eloquent defender of the "mitigating" line of cases states that there is no reason "why the requirement that sentencing decisions be based on *relevant* mitigating evidence . . . increases the risk that those decisions will be based on the *irrelevant* factor of race." *Graham*, *supra*, 122 L. Ed. 2d, at 293-294, 113 S. Ct., at 917 (Stevens, J., dissenting) (emphasis in original). By focusing on the admission of *relevant* mitigating evidence, the mitigating line can be seen not as a raw exercise of judicial power to reduce the number of executions, but instead as an effort to promote the accuracy of the sentencer's decision. See *Lockett*, *supra*, 438 U. S., at 602-603 (plurality). By focusing on the individual culpability of each defendant, capital sentencing becomes more reliable. "[T]he rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982). Justice O'Connor sounded a similar note in her concurrence, finding that the purpose of the *Lockett* rule is to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.*, at 118. Or, as Justice Stevens notes, "[w]hen . . . relevant facts are excluded from the sentencing determination, there is more, not less reason to believe that the sentencer will be left to rely on irrational considerations such as racial animus." *Graham*, *supra*, 122 L. Ed. 2d, at 293, 113 S. Ct., at 917 (Stevens, J., dissenting).

Placing the mitigating line of cases on a foundation of evenhandedness helps rationalize this Court's capital jurisprudence. It minimizes the potential tension between the two main lines of cases, and it provides a uniting principle—that the death penalty must be applied evenhandedly to all capital defendants. This Court recognized this when it most recently reconciled the tension between the narrowing and mitigating lines of cases. "There is one principle common to both decisions, however: The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa*, *supra*, 129 L. Ed. 2d, at 760, 114 S. Ct., at 2635.

In addition to providing the rationale for modern capital jurisprudence, the principle of equality also limits the extension of *Furman*. Judicial review must be used sparingly. "The fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment." *Mu'Min* v. *Virginia*, 500 U. S. 415, 430-431 (1991). Judicial restraint is particularly important with regards to capital punishment. Punishment is the key to any criminal justice system. See *People* v. *Roberts*, 2 Cal. 4th 271, 316, 826 P. 2d 274, 278 (1992). By providing the ultimate punishment for the ultimate crimes, the death penalty plays a particularly important role in those systems that employ it. Thus the federal courts may not invoke the Eighth Amendment to micromanage state death penalty schemes. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1012-1013, 115 S. Ct. 1031, 1034-1035 (1995). Courts should be careful before invoking the Eighth Amendment to interfere with the death penalty.

One way of limiting the courts' reach over the death penalty is to limit the Eighth Amendment to those rules that serve the core purpose of *Furman*—insuring an evenhanded application of the death penalty. This would prevent the unprecedented expansion of *Furman* that petitioner asks the Court to create in the present case.

II. The principle of evenhandedness underlying *Furman* is not served by the creation of a separation of powers requirement.

Petitioner asks this Court to do the unprecedented. He wants the Court to add a separation of powers branch to the already complicated capital jurisprudence that has grown from *Furman* v. *Georgia*, 408 U. S. 238 (1972). This extension would not advance *Furman*'s purpose of promoting evenhandedness, would add more complexity to an already overburdened system, and would be contrary to precedent. The Court must nip this branch in the bud before its fruits poison capital sentencing.

A. Complexity.

Furman created one of the most complex bodies of law known to this Court. The difficulty in reconciling the potential tensions between this Court's narrowing and mitigating lines of cases, see Part I B, *ante*, at 7, only scratches the surface of the complexity of modern death penalty procedure.

Another example comes from the problems associated with the use of the label "weighing" as applied to capital sentencing schemes. Whether a sentencing scheme is labeled "weighing" or "nonweighing" determines whether *Clemons* v. *Mississippi*, 494 U. S. 738 (1990) or *Zant* v. *Stephens*, 462 U. S. 862 (1983) provides the appropriate standard for determining whether a death sentence was rendered invalid by the consideration of unconstitutional aggravating factors. See *Richmond* v. *Lewis*, 121 L. Ed. 2d 411, 420, 113 S. Ct. 528, 534 (1992). The choice of label is crucial. If a state has a "weighing" system, then the death sentence cannot stand unless there is a separate reweighing by a court without considering the invalid circumstances. *Clemons*, *supra*, 494 U. S., at 744-745. In a "nonweighing" state, however, an invalid circumstance will not overturn a sentence so long as at least one valid aggravating circumstance remains. *Zant*, *supra*, 462 U. S., at 873-874.

While that distinction is crucial to a great many death sentences, this Court has provided little useful guidance to distinguish "weighing" from "nonweighing" systems. See

Flamer v. *Delaware*, No. 93-9000 (CA3, Oct. 19, 1995) (Lewis, J., dissenting). Instead, the lower courts must resort to various factors to differentiate "weighing" from "nonweighing" schemes. See *Williams* v. *Calderon*, 52 F. 3d 1465, 1478, n. 13 (CA9 1995). The confusion engendered by this Court's precedents in this area has been noticed by some of its members. See *Stringer* v. *Black*, 117 L. Ed. 2d 367, 383, 112 S. Ct. 1130, 1140 (1992) (Souter, J., dissenting).

This Court has proliferated a blizzard of rules regulating capital punishment procedure. See Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing, 18 U. C. Davis L. Rev. 1037, 1039-1040 (1985). This complexity means that "[t]he search for a coherent constitutional sentencing theory will be arduous." *Id.*, at 1039. This complexity has been noticed by those charged with applying *Furman* and its heirs. "[T]he death penalty has become the source of an increasingly vast and enormously complex body of constitutional law, posing issues which often defy clear or even sound resolution." *Flamer*, *supra* (Lewis, J., dissenting).

Grafting a separation of powers branch onto this body of law can only add to its burdensome complexity. Playing referee between the three branches of government is inherently difficult for this Court, sitting at the apex of one of the branches. The difficulty is compounded by the reality of governing. The government simply cannot be divided into three totally separate branches—some overlap is essential. See *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977). This means that

> "[a]s a principle of statesmanship the practical demands of government preclude its doctrinaire application . . . . In a word, we are dealing with what Sir Henry Maine, following Madison, calls a 'political doctrine,' and not a technical rule of law. Nor has it been treated by the Supreme Court as a technical legal doctrine. From the beginning that Court has refused to draw abstract, analytical lines of separation and has recognized the necessary areas of interaction." Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1012-1014 (1924).

One example of the complexity threatened by petitioner's proposal is the troubling questions of federalism it raises. The death penalty is very rare at the federal level; it is almost solely a state measure. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1993, p. 666 (1994). While recent changes in federal law will lead to relatively more federal death penalties, the death penalty is a component of "preventing and dealing with crime [which] is much more the business of the states than it is of the Federal Government," *Patterson* v. *New York*, 432 U. S. 197, 201 (1977), and will always be primarily a state matter.

Therefore, any separation of powers component of *Furman* logically should be applied to the states.[3] Yet the Constitution reserves the separation of powers for the *federal* government. See U. S. Const., Arts. I-III. States are primarily involved with separating powers under the doctrine of federalism that apportions powers between the states and the federal government. See, *e.g.*, *id.*, Amdt. 10.

The only part of the Constitution concerned with intrastate separation of powers is Article IV, § 4, which empowers the United States to guarantee each state "a Republican form of Government . . . ." Yet this Court consistently holds that this clause is nonjusticiable as "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." *Luther* v. *Borden*, 7 How. (48 U. S.) 1, 42 (1849); see also *Texas* v. *White*, 7 Wall. (74 U. S.) 700, 729 (1869); *Baker* v. *Carr*, 369 U. S. 186, 218-232 (1962). It is simply alien and disruptive for the federal courts to tell the states how to balance their governments. Petitioner's argument, if accepted, drops this unsettling puzzle into the lap of the federal judiciary.

As the leading modern treatise notes, "[t]he concept of separation of powers is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes." 1 R. Rotunda & J. Nowak, Treatise on

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3. The notion that *Furman* already applies a separation of powers component to the states is refuted in the next section of this brief. See Part II B, *post*.

Constitutional Law § 3.12, p. 352 (2d ed. 1992). Adding such concepts to this Court's already complex capital punishment jurisprudence threatens to overwhelm it. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (Jackson, J., concurring and dissenting).

B. Contrary to Furman.

In addition to being a bad idea, fashioning a separation of powers doctrine from the Eighth Amendment is also bad law. The concept of separate powers does not belong in the Eighth Amendment, *Furman* v. *Georgia*, 408 U. S. 238 (1972), or its successors. Under this Court's precedents, what matters is that procedures that channel discretion and make capital sentencing accurately individual are in place. The branch of government from which these procedures come is irrelevant.

This principle is demonstrated in *Proffitt* v. *Florida*, 428 U. S. 242 (1976). One attack made against Florida's capital sentencing scheme was that two of the statutory aggravating circumstances were unconstitutionally vague. *Id.*, at 255 (joint opinion of Stewart, Powell, and Stevens, JJ.). The lead opinion did not simply look to the statutory language enacted by the Florida legislature, but instead "considered [them] as they have been construed by the Supreme Court of Florida." *Ibid.* As narrowed by the Florida Supreme Court, the challenged provisions passed constitutional muster. *Id.*, at 256.[4]

Any notion that *Furman* contains an Eighth Amendment component is contrary to this result. Of the two challenged circumstances, at least one circumstance, that the killing was " 'especially heinous, atrocious, or cruel,' " *id.*, at 255, was facially unconstitutional. See *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988). Since this circumstance was saved not by legislative, but by judicial action, at least part of Florida's capital sentencing scheme was judge-made. Yet this fact was irrelevant to the *Proffitt* decision. It did not matter which branch of

4. This part of the lead opinion in *Proffitt* was accepted by a majority of the Court. See *id.*, at 260 (White, J., concurring).

government fixed the aggravating circumstances; what mattered is that the relevant circumstance did its job—"eliminate the arbitrary infliction of death . . . ." *Proffitt*, *supra*, 428 U. S., at 254. This same practice of court-construed aggravating circumstances was upheld by a majority of this Court in *Walton* v. *Arizona*, 497 U. S. 639, 655 (1990).

Petitioner's argument that this Court's capital precedents mandate legislative enactment of death penalty procedures, see Brief for Petitioner 19-20, withers under scrutiny. The joint opinion's dictum in *Gregg* v. *Georgia*, 428 U. S. 153, 175-176 (1976), that only legislatures can determine the death penalty has to be read in context. This statement was part of a warning that courts must limit their judicial review of the decisions of democratic bodies. "But while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." *Id.*, at 174-175. What mattered was not that Georgia's death penalty law was enacted by the legislature as opposed to the governor.[5] What mattered was that the Court was reviewing the act of an *elected* body. " 'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.' " *Id.*, at 175 (quoting *Dennis* v. *United States*, 341 U. S. 494, 525 (1951) (Frankfurter, J., concurring)).

The statement quoted by petitioner was part of a policy of deference to the wishes of the people. The President, like the Georgia legislature, is a representative of the people. He is subject to election, see U. S. Const., Amdt. 12, and as the chief executive, sits at the apex of one of the "political Branches." See *Weiss* v. *United States*, 127 L. Ed. 2d 1, 23, 114 S. Ct. 752, 767 (1993) (Souter, J., concurring). "And a heavy burden rests on those who would attack the judgment of the representatives of the people." *Gregg*, *supra*, 428 U. S., at 175. The President, by virtue of his national election, deserves as much respect.

Justice Powell's statement in *Furman* concerning the legislative prerogative in capital punishment was an unsuccessful

5. The governor of Georgia played an indirect role in the promulgation of its sentencing law, having the power to veto any legislation he deemed improper. See Ga. Const. of 1877, art. 5, § 1, ¶ 16.

attempt to restrain unelected, life-tenured federal judges. "Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing *the nine men who sit on this bench* of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics." *Furman* v. *Georgia*, 408 U. S. 238, 418 (1972) (dissenting opinion) (emphasis added). The other cases cited by petitioner, see Brief for Petitioner 20, are similarly unconcerned with limiting executive power. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1013, 115 S. Ct. 1031, 1035 (1995) (limiting this Court's "power of judicial review"); *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989) (legislative judgment is best evidence of how "society views a particular punishment"); *Stanford* v. *Kentucky*, 492 U. S. 361, 370 (1989) (same); *Thompson* v. *Oklahoma*, 487 U. S. 815, 821-822 (1988) (plurality) (same, looking to "the work product of state legislatures and sentencing juries").

These cases stand for nothing more than the proposition that unelected judges should defer to the policy judgments of the people's representatives. The President, as a representative of the people, deserves similar respect. Arguments taken out of context can mislead. See *Oregon* v. *Elstad*, 470 U. S. 298, 304 (1985). This Court should not be misled by Petitioner's out of context arguments.

This Court's modern capital jurisprudence is founded upon one principle. "The State must ensure that the *process* is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 760, 114 S. Ct. 2630, 2635 (1994) (emphasis added). *Furman* should only be extended when it serves this goal. If there is a separation of powers argument to be made[6] it should be made with regard to Articles I and II of the Constitution, not the Eighth Amendment. That is where the separation of powers belongs, and that is where it should stay.

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6. *Amicus* defers to the Solicitor General's arguments regarding the real separation of powers issue under Article I, §§ 1 and 8, and Article II, § 2 of the United States Constitution.

III. *Furman* does not apply to the military.

Furman v. *Georgia*, 408 U. S. 238 (1972) and its progeny have created a complex body of law regulating the death penalty, a practice largely confined to state criminal justice systems. Petitioner now wishes to extend this Court's capital jurisprudence to the vastly different military justice system. The military is a different society possessing a differently structured criminal justice system than the state systems that spawned *Furman*. These differences are enough to raise a serious question of whether *Furman* applies to the military.

A. Different Society.

> "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " *Parker* v. *Levy*, 417 U. S. 733, 743 (1974) (quoting *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17 (1955)).

Because the military's role is to make or deter war, it must be much more authoritarian than civilian society. "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *In re Grimley*, 137 U. S. 147, 153 (1890); *Levy*, *supra*, 417 U. S., at 744.

The ability to make war is the first requirement of any national government. War is an act of violence by which one sovereign asserts its will against another. See C. Clausewitz, On War 101 (Rapoport ed. 1968). Since it is between sovereigns, it is between entities that do not recognize a common higher authority and command sufficient force to maintain their independence. See *Prize Cases*, 2 Black (67 U. S.) 635, 667 (1863); *Foster* v. *Neilson*, 2 Pet. (27 U. S.) 253, 307-309 (1829). Therefore, states are left to their own internal law to determine how or why they wage war. See Hirschhorn, The

Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C. L. Rev. 177, 208-209 (1984). Because the United States exists in this state of nature, the war powers granted to the political branches are necessarily broad. See The Federalist No. 41, pp. 256-257 (C. Rossiter ed. 1961) (J. Madison). If the United States cannot defend itself, then the Constitution is reduced to a scrap of paper, with no more authority or relevance than Hammurabi's codes.

Discipline is essential to a nation's defense. An undisciplined military is an armed mob, weakening a nation's competence to defend itself so that its policies may be hamstrung, or its existence imperiled. "If one nation maintains constantly a *disciplined* army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions." *Id.*, at 257 (emphasis added).

Discipline is also necessary to maintain civilian control over the military. Civilian control over a politically neutral military establishment is part of a long American tradition. *Greer* v. *Spock*, 424 U. S. 828, 839 (1976). A lack of discipline is a clear and present danger to civilian control. The President, a civilian, sits at the top of the military hierarchy, see U. S. Const., Art. II, § 2. Any indiscipline at any level of that hierarchy is some threat to civilian control. History is full of examples of breakdowns in discipline subverting civilian control of government. See Hirschhorn, *supra*, 62 N. C. L. Rev., at 215-217. "As long as the Constitution gives the President and Congress the authority to determine the ends for which military force will be used, civilian supremacy requires a system of military discipline that inculcates all ranks with an attitude of active subordination, *i.e.*, the will to carry out the instructions of their civilian superiors despite their own disagreement." *Id.*, at 217.

Individual discipline within an organization is maintained through both direct and indirect controls. Direct discipline simply punishes bad behavior and rewards good behavior. Indirect discipline maintains order by the development of norms to which the individuals in the organization subscribe. This " 'organizational conscience' " allows each individual to

conform his or her actions to the organization's interests without the need for direct supervision. See *id.*, at 219.

The criminal law is essential to both of these methods through deterring improper conduct and by expressing society's outrage at such acts. See *People* v. *Roberts*, 2 Cal. 4th 271, 316, 826 P. 2d 274, 298 (1992). Punishment, "the very purpose of virtually all criminal proceedings," *United States* v. *Goodwin*, 457 U. S. 368, 372 (1982), is integral to the criminal law's competence to deter misconduct and sanctify values. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 33-36 (1986). Any attempt to limit the military's ability to sanction crimes can undermine essential discipline.

Because *Furman* and its progeny limit capital punishment, they would hinder military discipline. Since capital punishment sits at the apex of punishment, it is very important to those systems that employ it. See *ante*, at 10. Therefore, importing *Furman* to the military may pose a real threat to this special society.

This Court's precedents and current events combine to illustrate how *Furman* can hamstring our national defense. Current military law allows for the death penalty to be imposed for a rape committed during hostilities or in a territory under U. S. occupation. See Art. 120, Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 920. This provision appears on its face to violate one of *Furman*'s progeny, at least as it pertains to rapes of adult women. See *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977). Yet, as recent events in Okinawa demonstrate, rape of a civilian by a serviceman abroad can devastate this country's ability to maintain its forces in another country. See Edward W. Desmond, *Rape of an Innocent, Dishonor in the Ranks*, Time, Oct. 2, 1995, pp. 51-52.

" '[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life' in order to prepare for and perform its vital role." *Goldman* v. *Weinberger*, 475 U. S. 503, 507 (1986) (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); brackets added by *Goldman* Court; citation omitted). Punishment is too important a part of this discipline for it to be impeded by the heavy hand of *Furman*. The military is simply different, and must be treated differently.

B. Different System.

The differences between the military and civilian society are not only social. The very structure of the military justice system mitigates the ills this Court sought to remedy in *Furman* v. *Georgia*, 408 U. S. 238 (1972) and its successors. Since the military has less need for *Furman*, it should be exempt from *Furman*'s burden.

The essence of *Furman* and its successors is "to guard against bias or caprice in the sentencing decision." *Tuilaepa* v. *California*, 129 L. Ed. 2d 750, 760, 114 S. Ct. 2630, 2635 (1994). Therefore, these cases seek to control the acts of the capital sentencer, which is usually a sentencing jury, but sometimes is the trial judge. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1017, 115 S. Ct. 1031, 1038 (1995) (Stevens, J., dissenting).

Both sentencers run the risk of being susceptible to local passion and bias. Juries must be drawn from the locality[7] and are expected to reflect the community's judgments. See *Williams* v. *Florida*, 399 U. S. 78, 100 (1970). Since they are expected to judge the very worst crimes, this problem is potentially greater with capital sentencing juries. This risk is not necessarily lowered by the use of judicial sentencing. Almost all state general jurisdiction court judges are subject to some form of election. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1993, pp. 85-86 (1994). This places trial judges at some risk of being influenced by local passions. See *Harris* v. *Alabama*, 130 L. Ed. 2d 1004, 1020-1021, 115 S. Ct. 1031, 1040-1041 (1995).

The court-martial is not like a judge. It is of limited duration, see D. Schlueter, Military Criminal Justice § 8-1, p. 293 (3d ed. 1992), and has no particular legal competence, see *id.*, § 8-3(A), at 296-298 (describing role of the separate military judge).

Nor is the court-martial like a jury. This is not a body randomly drawn from a list that reflects a fair cross-section of

7. See U. S. Const., Amdt. 6 (right to trial by an impartial jury of the state and district wherein the crime shall have been committed).

the community. See *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975). Instead, the convening authority[8] is directed to detail those "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ Art. 25(d)(2), 10 U. S. C. § 825(d)(2). While enlisted personnel have the right to have enlisted members on the jury, they may not come from the accused's unit. UCMJ Art. 25(c)(2), 10 U. S. C. § 825(c)(2).

This body simply does not raise the same risks that juries do. It does not have to be drawn from the locality. It is not randomly selected, but is instead taken from those most likely to be accurate fact-finders and just sentencers. Ultimate control over its selection is not local. Instead, the most cosmopolitan of officials, the President, is responsible for the court-martial. If bias or arbitrariness manifested itself in military capital punishment, the President, by virtue of his national constituency, has the interest to eliminate it, and, as head of the military justice system, has the means to do so. The President's similar control over the prosecution mitigates concerns about the discretion of local prosecutors creating bias. See *McCleskey* v. *Kemp*, 481 U. S. 279, 363-364 (1987) (Blackmun, J., dissenting).

The military is different. Evenhandedness is already preserved by the military's structure, and its special society and needs make *Furman* abnormally burdensome to the military. *Furman* is thus no more than an unnecessary shackle on civilian control of the military.

8. The convening authority is either the President, the Secretaries of the military departments, or certain commanders. See UCMJ Arts. 22-24, 10 U. S. C. § 822-824.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces should be affirmed.

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Respectfully submitted,

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